

No. 14670

**United States
Court of Appeals
for the Ninth Circuit**

NORMAN BREELAND,

Appellant,

vs.

SOUTHERN PACIFIC COMPANY and E. D.
MOODY,

Appellees.

Transcript of Record

**Appeal from the United States District Court for the
Northern District of California,
Southern Division.**

FILED

APR 18 1955

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

THOMAS C. PERKINS, ESQ.,

801-9th St.,

Sacramento, Calif.,

Attorney for Plaintiff and Appellant.

BURTON MASON, ESQ.,

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65 Market St.,

San Francisco 5, Calif.,

Attorneys for Defendants and Appellees.

In the United States District Court for the
Northern District of California, Southern Division

No. 33262

NORMAN BREELAND,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a Corpora-
tion, and E. D. MOODY,

Defendants.

PETITION OF SOUTHERN PACIFIC COM-
PANY FOR REMOVAL OF CIVIL ACTION
FROM STATE COURT TO UNITED
STATES DISTRICT COURT

To the Honorable, the United States District Court
for the Northern District of California, South-
ern Division:

Your petitioner, Southern Pacific Company, a
corporation, petitioning to remove a civil action
brought in the State Court to the United States
District Court for the Northern District of Cali-
fornia, Southern Division, respectfully shows:

I.

Heretofore, and on the 22nd day of December,
1953, a civil action was commenced in the Superior
Court of the State of California, in and for the
City and County of San Francisco. Said action was
and is entitled and numbered in said Court and on
the files of the Clerk of said Court as appears on

the copy of the complaint served on petitioner, a copy of which is attached hereto, marked "Exhibit A" and incorporated herein as though set forth in full. Petitioner and E. D. Moody are named in said action as the sole defendants. The nature of the action appears from said copy of said complaint hereto attached. Process in said action was first served on your petitioner on December 22, 1953. Attached hereto and herein incorporated as such are copies of all process, pleadings and orders served upon petitioner, namely, "Exhibit A." This petition is accompanied by a bond with good and sufficient surety conditioned that your petitioner, defendant in said action, will pay all costs and disbursements incurred by reason of the removal proceedings should it be determined that the case was not removable or was improperly removed.

II.

Your petitioner, Southern Pacific Company, at all times mentioned in the complaint in said action was, and it now is, a corporation duly created, organized and existing under and by virtue of laws of the State of Delaware, and of no other State, and was at all of said times a citizen and resident of the State of Delaware.

III.

The plaintiff was at the time of the commencement of said action, ever since has been, and is now a citizen and resident of the State of California, and at none of said times was he a citizen or resident of the State of Delaware.

IV.

The above-entitled suit and action at all times was and is of a civil nature at law, over which the District Courts of the United States are given jurisdiction, brought for the recovery of \$20,000 damages and an unstated amount of additional damages in the nature of wage loss, all claimed to have been caused by the alleged wrongful discharge of plaintiff on September 5, 1950, from his employment by the defendant as a brakeman. Petitioner wholly contests and denies said claim of the complaint. The amount in controversy in said suit and action exceeds, exclusive of interest and costs, the sum and value of \$3,000, being of the sum and value of \$20,000, plus the unstated amount of wage loss referred to in the aforementioned complaint.

V.

For reasons which appear hereafter, this action is properly one wholly between citizens and residents of different states, to wit, between plaintiff, a citizen and resident of the State of California, and defendant, Southern Pacific Company, a corporation, a citizen and resident of the State of Delaware. Defendant E. D. Moody is presently Assistant General Manager of defendant Southern Pacific Company and is a citizen and resident of the State of California. Nevertheless, this action is properly removable because (1) no cause of action is stated against defendant E. D. Moody and plaintiff's failure to state a cause of action is obvious according to

the settled rules of the State of California; (2) the intended claim involves a separable controversy; and (3) defendant E. D. Moody was improperly and fraudulently joined herein as a defendant for the sole purpose of preventing removal of this cause, all of which is more fully stated hereinafter.

VI.

The complaint states no cause of action against the defendant E. D. Moody, there being no connection shown between E. D. Moody and plaintiff's alleged wrongful discharge. Nor does it appear that E. D. Moody was a party to the written agreement which is set forth in paragraph IV of the complaint as being the basis of the intended cause of action or that E. D. Moody could possibly have been liable for a breach of the said agreement.

VII.

There is in the above suit a separable controversy which is wholly between plaintiff and the petitioner which can be fully determined as between them without the presence of petitioner's co-defendant, E. D. Moody, and even if it were assumed that the acts had been alleged to have been done jointly by petitioner and its co-defendant they would have been, if done at all, done by petitioner alone, and its co-defendant did not at any time material to the complaint possess, control or use the authority or jurisdiction over the employment or dismissal of plaintiff or the prior or subsequent handling thereof; nor is the said co-defendant alleged to be a

party to the written agreement upon which the complaint is based.

VIII.

By reason of the facts set forth in paragraph VII above, which the said plaintiff well knew at the time of bringing this suit, the defendant E. D. Moody is improperly and fraudulently joined herein as a defendant for the sole purpose of fraudulently and improperly preventing or attempting to prevent this petitioner from removing this cause as prayed for herein, and for no other purpose.

IX.

Petitioner has not appeared in said action and petitioner is not required by the laws of California, or by the laws of the United States of America, or by any rule of the Court in which said action was commenced, or otherwise, to answer or plead to aid complaint prior to January 2, 1954.

X.

Petitioner shows that by reason of the premises and the aforesaid facts it desires, and is entitled, to have said suit and action removed from the Superior Court of the State of California in and for the City and County of San Francisco, into the United States District Court for the Northern District of California, Southern Division.

Wherefore, petitioner prays that this action be removed from said State Court into the United States District Court for the Northern District of California, Southern Division, and that no other

or further proceedings be had in this suit in said State Court, and for such other, further and different relief as, the premises considered, is proper.

BURTON MASON,

/s/ W. A. GREGORY,

Attorneys for Defendants.

Duly verified.

EXHIBIT A

In the Superior Court of the State of California
in and for the City and County of San Francisco

No. 434174

NORMAN BREELAND,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,
and E. D. MOODY,

Defendants.

COMPLAINT

Plaintiff complains of defendants, and for cause of action alleges:

I.

That at all times herein mentioned defendant Southern Pacific Company was a corporation, incorporated and existing under the laws of the State of Delaware, and at all times herein mentioned was doing business in the State of California.

II.

That E. D. Moody is the Assistant General Manager of the defendant Southern Pacific Company, and at all times herein mentioned was acting as the agent of the defendant Southern Pacific Company and within the scope and course of his employment.

III.

That on September 5, 1950, and for a long time prior to said time, plaintiff was employed as a brakeman by the defendant Southern Pacific Company.

IV.

That at all times herein mentioned a written agreement existed between the defendant Southern Pacific Company and the Brotherhood of Railroad Trainmen, said agreement covering the terms of employment between plaintiff and defendant Southern Pacific Company.

V.

That pursuant to the terms of said agreement plaintiff was not to be discharged except for just cause, and not to be discharged without a fair and impartial investigation.

VI.

That on November 30, 1949, plaintiff was unjustly accused of having been intoxicated while on duty.

VII.

That plaintiff on September 5, 1950, was discharged without said fair and impartial hearing

having been held, and that said discharge was wrongful and without just cause.

VIII.

That plaintiff was denied his wages from November 30, 1949, and continues to be denied his wages; that plaintiff is informed and believes, and therefore alleges, that he will continue to be denied his wages for an indefinite period of time in the future. That the amount of said wages is at this time unascertainable, and plaintiff asks leave of court to insert the amount of..... herein as the loss of wages when said loss of wages is ascertained, all to plaintiff's damage in the amount of..... for loss of wages.

IX.

That plaintiff has been deprived of seniority benefits, pension benefits, hospital benefits, as a result of such wrongful discharge, and that his damage for the loss of such benefits amounts to \$20,000.00.

Wherefore, plaintiff prays for judgment against the defendants in the amount of \$20,000.00, for loss of his seniority benefits, pension benefits, and hospital benefits; and for the sum of..... for damages for such loss of wages as will be hereafter ascertained; and for his costs of suit; and for such other and further relief as may seem meet and proper.

THOMAS C. PERKINS,
Attorney for Plaintiff.

State of California,
County of Sacramento—ss.

Thomas C. Perkins, being first duly sworn, deposes and says:

That he is the attorney for the plaintiff in the above-entitled action; that said plaintiff resides outside the county in which said attorney maintains his office; that he has read the foregoing complaint, and knows the contents thereof; that the same is true of his own knowledge, except as to those matters therein stated on information and belief, and as to those matters he believes it to be true.

THOMAS C. PERKINS.

Subscribed and sworn to before me this...day of
December, 1953.

LORRAINE A. LARKIN,
Notary Public in and for the County of Sacramento,
State of California.

In the Superior Court of the State of California
in and for the City and County of San Fran-
cisco

No. 434174

NORMAN BREELAND,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a Corpora-
tion, and E. D. MOODY,

Defendants.

SUMMONS—GENERAL

Action brought in the Superior Court of the State
of California in and for the City and County
of San Francisco, and the complaint filed in the
office of the County Clerk of said City and
County.

The People of the State of California Send Greet-
ing to: Southern Pacific Company, a Corpora-
tion, and E. D. Moody, Defendants.

You Are Hereby Directed to appear and answer
the complaint in an action entitled as above brought
against you in the Superior Court of the State of
California, in and for the City and County of San
Francisco, within ten days after the service on you
of this summons—if served within this City and
County; or within thirty days if served elsewhere.

And you are hereby notified that unless you ap-
pear and answer as above required, the said Plain-
tiff will take judgment for any money or damages

for the Northern District of California, Southern Division; that copies of said Petition and Bond are hereto attached and made a part hereof.

Dated: December 31, 1953.

BURTON MASON,

W. A. GREGORY,

Attorneys for Defendants.

Affidavit of Service by Mail attached.

[Endorsed]: Filed December 31, 1953.

[Title of District Court and Cause.]

BOND FOR REMOVAL

Know All Men by These Presents:

That Indemnity Insurance Company of North America, a corporation organized and existing under the laws of the State of Pennsylvania, which said corporation has complied with the laws of the State of California with reference to doing and transacting business in said State, as Surety, is held and firmly bound unto Norman Breeland, plaintiff in the above-entitled action, in the penal sum of Five Hundred Dollars (\$500.00), for the payment of which sum well and truly to be made unto said plaintiff, his heirs, executors, administrators, successors or assigns, the undersigned Indemnity Insurance Company of North America binds itself, its successors and assigns, jointly and severally, firmly by these presents.

Sealed with the seal of said company and dated at the City and County of San Francisco, State of California, this 31st day of December, 1953.

Whereas, the above-entitled action, wherein Norman Breeland is plaintiff and Southern Pacific Company, a corporation, and E. D. Moody are defendants, has been brought and is pending in the Superior Court of the State of California, in and for the City and County of San Francisco, and bears docket number 434174; and

Whereas, Southern Pacific Company, defendant in said action, has petitioned or is about to petition the above-named United States District Court for the Northern District of California, Southern Division, for the removal to said United States District Court of said cause of action;

Now, the condition of this obligation is such that if the said defendant, Southern Pacific Company, shall pay all costs and disbursements incurred by reason of the removal proceedings, should it be determined that said case was not removable or was improperly removed, then this obligation shall be void; otherwise it shall remain in full force and effect.

The said Indemnity Insurance Company of North America hereby expressly agrees that in case of a breach of any condition hereof the said District Court may, upon notice to it of not less than ten (10) days, proceed summarily in the action, suit, case or proceeding in which this bond is given to ascertain the amount which said surety is bound to

pay on account of such breach, and render judgment therefor against it, and award execution therefor.

Witness the signature and seal of the undersigned the day and year first above written.

[Seal] INDEMNITY INSURANCE
 COMPANY OF NORTH
 AMERICA,

By /s/ GEORGE F. HAGG,
 Its Attorney-in-Fact.

State of California,
City and County of San Francisco—ss.

On this 31st day of December in the year one thousand nine hundred and fifty-three, before me, Alice Browne, a Notary Public in and for the City and County of San Francisco, personally appeared George F. Hagg, known to me to be the person whose name is subscribed to the within instrument as the Attorney-in-fact of the Indemnity Insurance Company of North America, and acknowledged to me that he subscribed the name of the Indemnity Insurance Company of North America thereto as principal, and his own name, as Attorney-in-fact.

[Seal] /s/ ALICE BROWNE,
Notary Public in and for the City and County of
 San Francisco, State of California.

My commission expires November 28, 1956.

[Endorsed]: Filed December 31, 1953.

[Title of District Court and Cause.]

DEFENDANTS' NOTICE OF MOTION FOR
SUMMARY JUDGMENT

To the Above-Named Plaintiff, and to His Attorney,
Thomas C. Perkins, Esq.:

You, and each of you, are hereby notified that on Monday, the 15th day of February, 1954, at the Courtroom of the above-entitled Court, in the United States Post Office Building, Seventh and Mission Streets, San Francisco, California, the above-named defendants will present to the Court their motion for the entry of summary judgment in their favor in this cause.

Said motion for summary judgment will be based upon the provisions of Rule 56 of the Federal Rules of Procedure; upon all the papers, files and pleadings in this action; upon the affidavit of Mr. H. E. Eyles, a copy of which is attached to this notice and herewith served upon you; and in particular upon each and all of the grounds specified in defendants' Memorandum of Points and Authorities in support of said motion, a copy of which is likewise attached hereto and herewith served upon you.

Dated at San Francisco, California, this 11th day of January, 1954.

BURTON MASON,

/s/ W. A. GREGORY,

Attorneys for Defendants.

[Title of District Court and Cause.]

AFFIDAVIT OF H. E. EYLER

State of California,

City and County of San Francisco—ss.

H. E. Eyler, being first duly sworn, deposes and says:

I am a citizen of the United States and of the State of California, residing in Alameda County, California. My office headquarters are at 65 Market Street, San Francisco, California.

I have been employed by Southern Pacific Company in various capacities for more than thirty years. My present position is Special Assistant, Operating Department, Office of the Vice President and General Manager, Southern Pacific Company. Since April 1, 1942, my duties have consisted primarily of handling labor relations for Southern Pacific Company, particularly with respect to discipline and grievances. Thus I have been directly concerned with the interpretation and application of the discipline and grievance provisions of the agreement between Southern Pacific Company (Pacific Lines) and the General Committee, Brotherhood of Railroad Trainmen, covering rates of pay and rules for trainmen employed on the Pacific Lines, Southern Pacific Company, dated December 1, 1939, effective December 16, 1939 (hereinafter referred to as "Agreement"), which were stated in the complaint to be applicable to the employment of plaintiff. A copy of this Agreement is attached as Exhibit "A" to this affidavit and is hereby referred to.

I make this affidavit for use in connection with the motion for summary judgment filed by defendants in the above-entitled action, and for any and all other purposes in connection with said action.

I have obtained all of the records covering the employment of plaintiff, who was formerly employed by the Company as a brakeman (synonymous with trainman) on the Sacramento and San Joaquin Divisions of Southern Pacific Company. These records indicate the following: That Norman Breeland, the plaintiff herein, was employed by Southern Pacific Company on November 3, 1942, and was dismissed for violation of Rule "G" of the Rules and Regulations of the Transportation Department by letter of B. W. Mitchell, Superintendent, San Joaquin Division, dated December 2, 1949. A copy of the said letter of December 2, 1949, is attached as Exhibit "B" to this affidavit and is hereby referred to. Subsequent to December 2, 1949, certain correspondence passed between plaintiff, and his representatives, and Southern Pacific Company. Exhibit "C" to this affidavit hereby referred to is photostatic copy of letter from Mr. H. D. Heard, Local Chairman, Brotherhood of Railroad Trainmen, to Mr. B. W. Mitchell, Superintendent, Southern Pacific Company, Bakersfield, California, dated December 3, 1949. Exhibit "D" to this affidavit hereby referred to is photostatic copy of letter from Norman Breeland, the plaintiff, addressed to Mr. B. W. Mitchell, dated December 3, 1949. Exhibit "E" to this affidavit hereby referred to is copy of letter from Mr. B. W. Mitchell to Mr. H. D.

Heard, dated December 8, 1949. Exhibit "F" to this affidavit hereby referred to is photostatic copy of letter from Mr. Glenn R. Bennett, Local Chairman, Brotherhood of Railroad Trainmen, addressed to Mr. B. W. Mitchell, dated April 19, 1950. Exhibit "G" to this affidavit hereby referred to is photostatic copy of letter from Mr. Glenn R. Bennett to Mr. B. W. Mitchell, dated May 22, 1950. Exhibit "H" to this affidavit hereby referred to is photostatic copy of letter from Mr. J. J. Corcoran to Mr. H. R. Hughes, dated May 24, 1950. Exhibit "I" to this affidavit hereby referred to is copy of letter from Mr. H. R. Hughes to Mr. J. J. Corcoran, dated September 5, 1950.

The agreement included at all times material to this case Article 58, "Limitation in Presenting Grievances," which sets forth certain provisions relating to the handling of grievances involving the dismissal or discipline of an employee. This article provides that in the event a disciplined or dismissed employee is dissatisfied with such discipline, he must present a written grievance covering the claim to the officer named in the article within the time limitation provided therein. Article 58, Section (c), Item 6, reads as follows:

"Item 6: The following provisions of Section 4(c), Item 2, of the Agreement made at Chicago, Illinois, December 12, 1947, reading:

" "Decision by the highest officer designated by the carrier to handle claims shall be final and binding unless within one year from the date of

said officer's decision such claim is disposed of on the property or proceedings for the final disposition of the claim are instituted by the employee or his duly authorized representative and such officer is so notified. It is understood, however, that the parties may by agreement in any particular case extend the one-year period herein referred to.'

is interpreted to mean that the decision by the highest officer designated by the carrier to handle time claims shall be final and binding unless within one (1) year from the date of said officer's decision (made subsequent to discussion of the case in conference as provided in Item 5) proceedings for final disposition of the claim are instituted by the employee or his duly authorized representative and such officer is so notified, subject to extension by mutual agreement."

On August 11, 1950, this case was discussed in conference as provided in Item 5 of Article 58. Thereafter on September 5, 1950, Mr. H. R. Hughes, then Assistant General Manager, Southern Pacific Company, designated as the highest officer to handle disputes falling within the purview of Article 58, addressed Mr. J. J. Corcoran, General Chairman, Brotherhood of Railroad Trainmen, setting forth his decision denying the request as provided in said Article 58, Item 6. On September 6, 1950, Mr. J. J. Corcoran addressed Mr. H. R. Hughes, stating that the case would be handled further by the General Committee. From and after September 6, 1950, the

files contain no further correspondence between plaintiff, or any representative on his behalf, and Southern Pacific Company, or any representative, agent or employee thereof. On September 22, 1953, the complaint in this action was filed.

The correct and consistently observed application of the above-quoted item of Article 58, "Limitation in Presenting Grievances," is as follows: If proceedings for the final disposition of the dispute either before the National Railroad Adjustment Board or in court are not commenced within one year from the date of the final decision referred to in Item 6 (in this case the decision of Mr. H. R. Hughes dated September 5, 1950; Exhibit "I" hereto), all rights under the Agreement terminate and the cause of action is deemed to have been abandoned. No such proceedings were instituted within the one-year limitation or at any other time until December 22, 1953, the date of the filing of the complaint in this action, which was more than three years next following the said decision.

/s/ H. E. EYLER.

Subscribed and sworn to before me this 11th day of January, 1954.

[Seal] /s/ RUTH W. GEORGE,
Notary Public in and for the City and County of
San Francisco, State of California.

My commission expires September 19, 1954.

EXHIBIT B

Bakersfield, December 2, 1949.

Mr. N. Breeland
Brakeman—Tracy

Evidence adduced at formal investigation held at Fresno, which convened 3:20 p.m., November 29, 1949, recessed 5:15 p.m., that date, reconvened 10:05 a.m., November 30th and adjourned 10:40 a.m., that date, established your responsibility for being under the influence of intoxicants while on duty as brakeman, Train 3/423 at Fresno, about 1:45 p.m. November 26, 1949.

Your actions in this instance constituted a violation of Rule "G" of the Rules and Regulations of the Transportation Department.

For reasons stated you are hereby dismissed from the service of the Southern Pacific Company.

B. W. MITCHELL.

EXHIBIT C

123 East 7th St.
Tracy, California

Dec. 3, 1949

Mr. B. W. Mitchell,
Supt. Sou. Pac. Co.,
Bakersfield, Calif.

Dear Sir:

Please send me copy of transcript of investigation which was held at Fresno Nov. 28 and 29, 1949.

whereby Brakeman N. Breeland was dismissed for violation of Rule "G."

Yours very truly,

/s/ H. D. HEARD,

Local Chairman Road Comm.
BRT Lodge 849.

P.S.—Please mail to address at top.

EXHIBIT D

Tracy, Calif.

December 3rd, 1949.

Mr. B. W. Mitchell:

I am in receipt of your letter of December 2nd, 1949, advising me that I am dismissed from the service of the Southern Pacific Co.

/s/ NORMAN BREELAND.

EXHIBIT E

(Copy)

December 8, 1949.

Mr. H. D. Heard
Local Chairman—BRT
123 East 7th Street
Tracy, California

Dear Sir:

As requested in your letter of December 3rd, attached is copy of transcript of testimony taken in formal investigation at Fresno which convened 3:20 p.m. November 29th, recessed 5:15 p.m. that date, reconvened 10:05 a.m., November 30th and ad-

journed 10:40 a.m. that date, with respect to Brake-
man N. Breeland being under the influence of in-
toxicants while on duty as brakeman, train 3/423,
Fresno Train Yard, November 26, 1949, which in-
cludes testimony of the following:

D. Fitzgerald—Caller (witness).

N. Breeland—Brakeman.

M. A. McIntyre—Trainmaster (witness).

W. F. Stuart—General Yardmaster (witness).

C. A. Owens—Conductor (witness).

W. R. Evans—Engineer (witness).

Yours truly,

Original signed:

B. W. MITCHELL.

Attach

ETS

ETS:MMc

EXHIBIT F

Brotherhood of Railroad Trainmen
Snowshed Lodge No. 743

Roseville, Calif.

April 19, 1950

B. W. Mitchell
Superintendent
Southern Pacific Co.
Bakersfield, California

Dear Sir:

In answer to your letter of March 27, 1950, I feel
that sufficient time has elapsed since our conference

for you to have made an inquiry as to the conduct of Norman Breeland since his dismissal from service of the Southern Pacific Company.

At the time of our conference I felt you were sincere in your statement that you would investigate this case, and if conditions warranted you would grant Mr. Breeland a personal conference with a recommendation for reinstatement in mind. In the event this cannot be discussed further with you I will appeal this case to the General Committee for further handling.

Awaiting an early reply.

Sincerely,

/s/ GLENN R. BENNETT,

Local Chairman BRT 743

[Stamped]: Received April 20, 1950, S.P.

EXHIBIT G

Brotherhood of Railroad Trainmen
Snowshed Lodge No. 743

Roseville, Calif.

May 22, 1950

B. W. Mitchell
Superintendent
Southern Pacific Co.
Bakersfield, California

Dear Sir:

This will acknowledge receipt of your letter of May 19, 1950, concerning the case of former brakeman Norman Breeland for reinstatement.

Please be advised that this committee cannot accept your decision, therefore, it will be appealed to the General Committee for further handling.

Yours truly,

/s/ GLENN R. BENNETT,
Local Chairman BRT 743.

cc: A. H. Whitmore.

[Stamped]: E.T.S. May 23, 1950. Received May 23, 1950. S.P.

EXHIBIT H

General Committee
Brotherhood of Railroad Trainmen
939 Pacific Building
San Francisco 3, California

May 24, 1950.

Mr. H. R. Hughes
Assistant General Manager
Southern Pacific Company
San Francisco 5, California

Dear Sir:

There has been appealed to this Committee the request of Brakeman N. Breeland, Sacramento Division (working on Stockton District, Western Division), for reinstatement with seniority unimpaired, and claim for compensation for time lost as a result of his dismissal from the service, December 2, 1949, for alleged violation of Rule "G" of the

Rules and Regulations of the Transportation Department at Fresno, November 26, 1949.

Will you please list this case for discussion at a future conference.

Yours very truly,

/s/ J. J. CORCORAN,
General Chairman.

EXHIBIT I

011-181 (B)

September 5, 1950.

Mr. J. J. Corcoran, General Chairman
Brotherhood of Railroad Trainmen
939 Pacific Building
San Francisco 3, California

Dear Sir:

Your letter May 24, 1950, and our conference August 11, 1950, at which time we discussed request for reinstatement of former Brakeman Norman Breeland, Sacramento Division, who was dismissed by the San Joaquin Division on December 2, 1949, for being under the influence of intoxicants while on duty as a brakeman, Train 3/423, Fresno, November 26, 1949:

In conference you stated that you had information from your local chairman that Superintendent Mitchell had no objections to Breeland's reinstatement. Mr. Mitchell advises that he did not tell the local chairman that he had no objections to Bree-

land's reinstatement, but that he would give consideration to his case.

We advised you in conference that Breeland was a Sacramento Division employee at the time of his dismissal and that Superintendent Jennings, who is familiar with his past conduct and service, is unalterably opposed to his reinstatement.

After further consideration of the presentation made by you in Breeland's behalf, we can only conclude that because of the seriousness of the offense for which he was dismissed and his otherwise unsatisfactory record, leniency is not warranted, and your request is denied.

Yours very truly,

H. R. HUGHES.

Affidavit of Service by Mail attached.

[Endorsed]: Filed January 11, 1954.

[Title of District Court and Cause.]

ORDER

The defendants' motion for summary judgment having been regularly made and argued before the court, and the court having duly read and considered the affidavits and the motion and the Memorandum of Points and Authorities filed by counsel for both parties and said matter having been argued by both parties on the 1st day of March, 1954, and being fully advised in the premises;

It Is Hereby Ordered that defendants' motion for summary judgment is hereby denied.

Dated March 1, 1954.

/s/ MICHAEL J. ROCHE,
District Judge.

[Endorsed]: Filed March 3, 1954.

[Title of District Court and Cause.]

ANSWER

Southern Pacific Company and E. D. Moody, for answer to the complaint in the above-entitled action, admit, allege and deny as follows:

I.

Admit the allegations of Paragraph I of the complaint.

II.

Answering Paragraph II, admit that E. D. Moody is the Assistant General Manager of the defendant Southern Pacific Company; deny that at any time material to the complaint E. D. Moody was an agent of the defendant Southern Pacific Company possessing, controlling or using any authority or jurisdiction over the employment or dismissal of plaintiff or the prior or subsequent handling thereof; and deny each and every other allegation contained in Paragraph II.

III.

Admit that plaintiff was employed as a brakeman

by the defendant Southern Pacific Company from November 3, 1942, until December 2, 1949, on which date he was dismissed from service for violation of Rule "G" of the Rules and Regulations of the Transportation Department, and deny each and every other allegation contained in Paragraph III.

IV.

Admit that at all times material to the complaint there was in effect a written agreement between defendant Southern Pacific Company and the General Committee, Brotherhood of Railroad Trainmen, effective December 16, 1939, as amended at various times and in various particulars, covering rates of pay and rules of the class or craft of employees known as trainmen.

V.

Deny each and every allegation contained in Paragraph V.

VI.

Admit that on November 29 and 30, 1949, formal investigation was held, as provided in the agreement referred to in Paragraph IV above, in connection with charges that plaintiff was intoxicated while on duty, and denies each and every other allegation contained in Paragraph VI.

VII.

Deny each and every allegation contained in Paragraph VII.

VIII.

Deny each and every allegation contained in Paragraphs VIII and IX and deny, in particular, that

plaintiff has been damaged or suffered loss of wages in any sum or amount whatsoever.

IX.

Except as specifically admitted herein, defendants deny each and every other allegation contained in the complaint.

First Separate Defense

For a First, Further and Separate Defense to said complaint, defendants allege and show:

I.

The complaint fails to state a claim against defendants, or either of them, upon which relief can be granted.

Second Separate Defense

For a Second, Further and Separate Defense to said complaint, defendants allege and show:

I.

The right of action set forth in the complaint did not accrue within four years next before the commencement of this action.

Third Separate Defense

For a Third, Further and Separate Defense to said complaint, defendants further show and allege:

I.

At all times during the aforesaid employment of said plaintiff and continuing to the present time there was and now is also in effect as a part of said agreement of December 16, 1939, as amended in various particulars and at various times, referred to in Paragraph IV hereof the following provisions:

“Article 58.

“Limitation in Presenting Grievances.

“Section (c). Item 1: Any claim of trainmen not submitted in writing within 90 days of the date of the occurrence on which claim is based will be deemed to have been abandoned.

* * *

“Item 6: The following provisions of Section 4(c) Item 2, of the Agreement made at Chicago, Illinois, December 12, 1947, reading:

“ ‘Decision by the highest officer designated by the carrier to handle claims shall be final and binding unless within one year from the date of said officer’s decision such claim is disposed of on the property or proceedings for the final disposition of the claim are instituted by the employee or his duly authorized representative and such officer is so notified. It is understood, however, that the parties may by agreement in any particular case extend the one-year period herein referred to.’

is interpreted to mean that the decision by the highest officer designated by the carrier to handle time claims shall be final and binding unless within one (1) year from the date of said officer’s decision (made subsequent to discussion of the case in conference as provided in Item 5) proceedings for final disposition of the claim are instituted by the employee or his duly authorized representative and such

officer is so notified, subject to extension by mutual agreement.”

II.

That notwithstanding the express provisions of said Article 58 of said agreement of December 16, 1939, plaintiff did not at any time submit or process a claim or grievance in writing or institute or cause to be instituted proceedings for final disposition of the claim based upon dismissal, as required by said Article 58.

III.

By reason of the express provisions of said Article 58, plaintiff's asserted grievance or claim to reinstatement by reason of any such alleged violation by defendants, or either of them, is not entitled to consideration and has wholly ceased to exist.

Wherefore, the defendants Southern Pacific Company, a corporation, and E. D. Moody pray that plaintiff take nothing by his action; that defendants have judgment for their costs of suit incurred herein, and for such other, further and different relief as may be proper in the premises.

BURTON MASON,

/s/ W. A. GREGORY,

Attorneys for Defendants.

Dated: San Francisco, Calif., March 11, 1954.

Affidavit of Service by Mail attached.

[Endorsed]: Filed March 11, 1954.

[Title of District Court and Cause.]

DEFENDANTS' NOTICE OF MOTION FOR
SUMMARY JUDGMENT

To the Above-Named Plaintiff, and to His Attorney,
Thomas C. Perkins, Esq.:

You, and Each of You, are hereby notified that on Monday, the 10th day of January, 1955, at the Courtroom of the above-entitled Court, in the United States Post Office Building, Seventh and Mission Streets, San Francisco, California, the above-named defendants will present to the Court their motion for the entry of summary judgment in their favor in this cause.

Said motion for summary judgment will be based upon the provisions of Rule 56 of the Federal Rules of Procedure; upon all the papers, files and pleadings in this action; upon the affidavit of Mr. H. E. Eyler, a copy of which is attached to this notice and herewith served upon you; and in particular upon each and all of the grounds specified in defendants' Memorandum of Points and Authorities in support of said motion, a copy of which is likewise attached hereto and herewith served upon you.

Dated at San Francisco, California, this 28th day of December, 1954.

/s/ BURTON MASON,

/s/ W. A. GREGORY,

Attorneys for Defendants.

[The affidavit and exhibits referred to in the above

are identical to those attached to the Notice of Motion for Summary Judgment filed January 11, 1954.]

Affidavit of Service by Mail attached.

[Endorsed]: Filed December 29, 1954.

In the United States District Court, for the Northern District of California, Southern Division
No. 33262

NORMAN BREELAND,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation, and E. D. MOODY,

Defendants.

JUDGMENT

Defendants' Motion for Summary Judgment having been regularly made and argued before the Court on January 10, 1954. and the Court having considered the affidavits and the memoranda of points and authorities filed in respect to the motion.

It Is Ordered, Adjudged and Decreed that defendants, Southern Pacific Company and E. D. Moody, do have, and they are hereby granted judgment in their favor and against the plaintiff Norman Breeland, and that said plaintiff, Norman Breeland, take nothing by his complaint.*

Dated: January 13, 1955.

/s/ LOUIS E. GOODMAN,

United States District Judge.

*Barker v. Southern Pacific, 214 F.2d 918 (1954).

See, also *Wallace v. Southern Pacific*, 106 F. Supp. 742 (N.D. Calif. 1951); *Buberl v. Southern Pacific*, 94 F. Supp. 11 (N.D. Calif. 1950).

[Endorsed]: Filed January 13, 1955.

Entered January 14, 1955.

[Title of District Court and Cause.]

NOTICE

Notice Is Hereby Given that Norman Breeland, plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Order of the above-entitled court entering summary judgment for defendant in this action on January 14, 1955.

Dated this 20th day of January, 1955.

THOMAS C. PERKINS,
Attorney for Appellant
Norman Breeland.

[Endorsed]: Filed January 21, 1955.

[Title of District Court and Cause.]

UNDERTAKING ON APPEAL COSTS ONLY

Whereas, in an action in the United States District Court, Southern Division, Northern District of California (Court No. 33262-Civil), judgment was on the 14th day of January, 1955, rendered by the

Judge of said Court in favor of Southern Pacific Co., a Corporation, and E. D. Moody, Defendants, against Norman Breeland, the Plaintiff, for his summary discharge from employment of said Defendant; and whereas, the said Norman Breeland, Plaintiff, is dissatisfied with said judgment and desirous of appealing therefrom to the Ninth United States Circuit Court.

Now, Therefore, in consideration of the premises, and of such appeal, the undersigned, Hartford Accident and Indemnity Company, a Corporation organized and existing under the laws of the State of Connecticut, and duly authorized to transact a general surety business in the State of California, does hereby undertake in the sum of Two Hundred Fifty and No/100 Dollars, and promises on the part of the Appellant, that the said Appellant will pay all costs which may be awarded against Norman Breeland on said appeal or on a dismissal thereof, not exceeding the aforesaid sum of Two Hundred Fifty and No/100 Dollars, to which amount it acknowledges itself bound.

In Witness Whereof, the said surety has caused its corporate name and seal to be attached by its duly authorized Attorney-in-Fact at Sacramento, California, this 27th day of January, 1955.

HARTFORD ACCIDENT AND
INDEMNITY COMPANY,

By /s/ CHARLES F. ELSASSER,
Attorney-in-Fact.

State of California,
County of Sacramento—ss.

On this 27th day of January in the year one thousand nine hundred and fifty-five, before me, A. M. Collins, a Notary Public in and for said County of Sacramento, residing therein, duly commissioned and sworn, personally appeared Charles F. Elsasser, known to me to be the Attorney-in-Fact of the Hartford Accident and Indemnity Company, the Corporation described in and that executed the within instrument, and also known to me to be the person who executed it on behalf of the Corporation therein named, and he acknowledged to me that such Corporation executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my Official Seal, at my office, in the said County of Sacramento, the day and year in this certificate first above written.

/s/ A. M. COLLINS,
Notary Public in and for the County of Sacramento,
State of California.

My Commission will Expire April 30, 1957.

[Endorsed]: Filed February 1, 1955.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD
ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of Califor-

nia, do hereby certify that the foregoing documents, listed below, are the originals filed in this court, or true thereof, in the above-entitled case, and that they constitute the record on appeal herein as designated by the attorneys for the appellant:

Petition of Southern Pacific Company for removal of civil action from State Court to the United States District Court with documents attached.

Bond for removal.

Defendants' motion for summary judgment with exhibits attached.

Order denying motion for summary judgment filed March 3, 1954.

Answer.

Defendants' motion and notice for summary judgment with exhibits attached.

Judgment.

Notice of appeal.

Designation of contents of record on appeal.

Cost bond on appeal.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court, this 25th day of February, 1955.

[Seal]

C. W. CALBREATH,
Clerk;

By /s/ WM. C. ROBB,
Deputy Clerk.

[Endorsed]: No. 14670. United States Court of Appeals for the Ninth Circuit. Norman Breeland, Appellant, vs. Southern Pacific Company and E. D. Moody, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed February 26, 1955.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
Ninth Circuit
No. 14670

NORMAN BREELAND,

Plaintiff-Appellant,

vs.

SOUTHERN PACIFIC COMPANY, a Corpora-
tion, and E. D. MOODY,

Defendants-Appellees.

STATEMENT OF POINTS

Appellant submits the following as his Statement of Points on which he intends to rely in this appeal:

Point I: The trial court erred in granting Appellees' Motion for Summary Judgment on January 13, 1955, in that the trial court's previous order of March 3, 1954, denying Appellees' Motion for Summary Judgment was a bar to a subsequent motion on the same grounds with the same factual situation.

Point II: The trial court erred in granting Appellees' Motion for Summary Judgment in that the trial court erroneously interpreted the collective bargaining agreement at issue herein.

The trial court interpreted a particular provision of the agreement as setting up a one-year limitation on filing court actions for wrongful discharge. No evidence was taken on this factual issue.

Dated: March 8, 1955.

/s/ THOMAS C. PERKINS,
Attorney for Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed March 10, 1955.